IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20-6-2005

Coram:

The Honourable Mr. Justice T.V. MASILAMANI

C.R.P.(PD) No.1450 of 2004

1. Ambal Traders,
   rep. by its Partner M. Arumugam
   Ekkattuthangal, Chennai 600 097.
2. Chakrapani
3. E. Achutha Reddy
4. E. Vijayalakshmi
5. E. Krishnaveni
6. E. Menaka
7. D. Shanthi
8. D. Sridhar .. Petitioners / Plaintiffs

vs.

1. S.K. Krishnan
2. M. Varadan
3. D. Natesan
4. D. Kannan
5. D. Elumalai
6. T. Rajendran .. Respondents/ Defendants

Civil Revision Petition against the fair and decretal orders dated 1.7.2004 made in I.A.No.7531 of 2004 in O.S.No.8909 of 1979 on the file of the XIV Assistant Judge, City Civil Court, Chennai.

For Petitioners : Mr.T.R.Mani, S.C.
For Mr.A.Venkatesan

For Respondent-1 : Mr.R.Margabandu
For Respondent-2 : Mr.M.V.Venkataseshan
For Respondent-6 : Mr.P.Seshadri
RR4 & 5 died
R3 Not ready - Notice

...

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

ORDER

The revision petitioners are respondents 2 to 4, 6 to 8, 10 and 11/plaintiffs before the trial court.

2. The revision petitioners filed the suit in O.S.No.8909 of 1979 on the file of the XIV Assistant Judge, City Civil Court, Chennai for declaration of title to the suit property and for permanent injunction against the respondents 1 to 6 herein who are the defendants in the suit.

3. The first respondent herein/second defendant in the suit filed the application in I.A.No.7531 of 2004 before the trial court under Section 151 C.P.C. with a prayer not to take on record the report filed by the Advocate Commissioner and the Tahsildar and also not to admit the same in evidence in the above said suit for any purpose. The revision petitioners herein as respondents in the said applications filed counter statements resisting the same.

4. Learned XIV Assistant Judge, City Civil Court, Chennai after hearing both sides ordered the said application by appointing another Advocate Commissioner in the place of the earlier Advocate Commissioner to inspect the suit property again with a direction to inspect the suit property and measure the same with the assistance of a qualified surveyor and to file a report with necessary plan. This revision is filed challenging the legality of the said order.

5. The second respondent as petitioner filed the application before the trial court with the following contentions:-

The Advocate Commissioner appointed by the Court to inspect the suit property with reference to the physical features and also to measure the same with the assistance of a qualified surveyor has filed a report with necessary plan. Further the Tahsildar has also filed an independent report besides the report of the Commissioner. Though the Commissioner was directed to identify the suit property with reference to the suit documents he has not executed the warrant and identified the suit property as directed by the High Court. The Commissioner ought to have identified T.S.No.87, but he has failed to do so, as he has not fixed the survey stone and also identified the boundaries. Further the Commissioner has not correlated the description of the property found in the suit documents with that of the property identified on ground. A layout plan was said to be the basis for the Commissioner to identify the suit property, but, on the other hand, the layout plan was not marked as document in the suit. Hence the reports of the Commissioner, Surveyor and the Tahsildar and the plan filed in support of the same cannot be marked as documents in the suit

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

without examining the Commissioner and others. Hence the petition.

6. The contentions of the revision petitioners as respondents in the counter are briefly as follows:-

The unapproved layout plan with reference to T.S.No.87 had been marked as Ex.B-17 in a connected suit in O.S.No.8119 of 1979. It is true that the High Court, Madras had given direction that the suit property in O.S.No.8909 of 1979 as well as the property in O.S.No.8119 of 1979 had to be identified with reference to the revenue records and the documents marked in the said suits by appointing an Advocate Commissioner and therefore the Advocate Commissioner appointed in that regard filed necessary report along with the reports of the Tahsildar and surveyor. The contention of the petitioner that the report of the Commissioner should not accepted without examining the Commissioner, Tahsildar and Surveyor as witnesses has no legal basis for the reason that as per Order 26 Rule 10(2) C.P.C., the report of the Commissioner should form part of the records in the suit. Hence the petition is liable to be dismissed.

7. The court below rendered a finding that since the Advocate Commissioner could not identify the suit property, he has to inspect the property again in order to file a fresh report and therefore to arrive at the correct conclusion, the commission warrant has to be reissued to the Commissioner with necessary direction in that regard. Further, the learned Assistant Judge has also rendered a finding that another Advocate Commissioner has to be appointed in the place of the earlier Commissioner who already filed the report and plan and accordingly appointed another Advocate Commissioner with a direction to inspect the suit property and identify the same with the help of a qualified surveyor and to file a report and necessary plan. The revision petitioner has filed the revision challenging the said findings of the trial Court.

8. Heard Mr.T.R.Mani, learned senior counsel appearing for the revision petitioners and Mr.Margabandhu, learned counsel appearing for the first respondent.

9. It is not in controversy that originally a suit in O.S.No.8119 of 1979 was filed on 15.10.1979 before the City Civil Court Madras by the plaintiffs therein for declaration of title to the land in T.S.No.88 and for permanent injunction against the defendants therein of whom the second defendant is the second plaintiff in O.S.No.8909 of 1979 on the file of the same court. The suit property in the said suit is 0.83 acres out of 2.58 acres in T.S.No.88 within the specific boundaries situate at Ekkaduthangal village, Madras City Corporation Division No.120.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

10. The subsequent suit in O.S.No.8909 of 1979 was filed on 27.11.1979 by the revision petitioners for declaration of title and for permanent injunction in respect of plot No.40 in R.S.No.87 (old Survey No.76) measuring 2255 sq.ft. situate in Ekkaduthangal village, Madras City Corporation Division No.120. It is relevant to mention that except the fact that the second plaintiff in O.s.No.8909 of 1979 is the second defendant in O.S.No.8119 of 1979, there appears to be no connection whatsoever between the two suits mentioned above. However the High Court, Madras rendered a common judgment in S.A.No.1661 of 1989, S.A.Nos.776, 1174 & 754 of 1990 and W.P.No.8315 of 1993 dated 24.12.1999 by allowing the appeals and setting aside the impugned judgments and decrees in the said suits.

11. The relevant portion of the same is extracted hereunder:-

> "The learned XV Assistant City Civil Judge will appoint an Advocate Commissioner immediately on receipt of a copy of the judgment and the records after notice to parties with a direction to the Advocate Commissioner to take the assistance of a Surveyer to locate the properties covered by the suits on ground. For the purpose of locating the properties, apart from the documents already filed in the suits, other documents and records which may be available in the Survey and Revenue Departments may also be pressed into service."

12. In pursuance of the said judgment, the trial court appointed the Commissioner for identifying the suit properties involved in the said suits and accordingly he filed his report and plan. Similarly, the Tahsildar had been directed by the trial court to assist the Commissioner and he filed a separate report before the trial court. In connection with the reports filed by the Tahsildar and the Commissioner, the first respondent herein filed the application in I.A.No.7531 of 2004 in O.S.No.8909 of 1979 wherein the trial court has passed the impugned order.

13. Mr.T.R.Mani, learned senior counsel appearing for the revision petitioners has adverted the attention of this Court even at the outset that the trial court has committed an illegality in passing the impugned order and he has contended that as per Order 26 Rule 10(3) C.P.C., without satisfying itself as to the admissibility or otherwise of the Commissioner's report, the trial court cannot appoint a second commissioner. In this context, he has referred me to the decision rendered by a Division Bench of this Court in 1917 M.L.J. (Vol.60) 450 (KUNHI KUTTI ALI AND ANOTHER v. MUHAMMAD HAJI AND OTHERS) wherein the ratio has been laid down as under:-

> "A second commission should not be issued by the Court for the same purpose for which the first was issued, unless

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

the Court is dissatisfied with the report of the first, in which case, the Court should not take into consideration the report of the first Commissioner."

14. Similarly, he has also relied on the decisions, 1949 M.L.J. 183 (RAMACHAR v. KRISHNACHAR) and AIR 1995 MADRAS 274 (GOPALAKRISHNAN v. P. SHANMUGAM) rendered by this Court for the same proposition of law. In this context, it is useful to refer to the ratio laid down in 1949 M.L.J. 183 which runs as follows:-

"Where a Commissioner has been appointed and he has submitted a report to which both the parties had filed objections, it would be contrary to the provisions of Order 26, Rule 10(3), Civil Procedure Code, for the Court to appoint a fresh Commissioner without considering the merits of the application for such appointment and without giving any reasons why the previous Commissioner's report should be ignored as being unsatisfactory."

15. Similarly, in AIR 1995 MADRAS 274 referred supra RAJU.J. (as he then was) under similar set of facts and circumstances reiterated the principle of law as under:-

"Further mechanical and indiscriminate appointment of more than one Commission, merely because the Court thinks the other party to the proceedings may not be prejudiced or that the expenses for the commissions are going to be borne by the applicant for the purpose would create an unhealthy practice of not only more than one report on records, but also would lead to the vice of a person or party to the proceedings not being satisfied with the Commissioner's report seeking for the appointment of successive Commissioners till he is able to get a report of his choice."

16. Further, the learned senior counsel, Mr.T.R.Mani has drawn the attention of this Court to certain other facts so as to substantiate his further contention that the learned Assistant Judge, City Civil Court did not apply the mind either to the provisions of law referred to above or to the facts and circumstances while rendering the impugned order. In this context, he has pointed out that the first respondent herein filed the said application in I.A.No.7531 of 2004 before the trial court wherein the impugned order has been passed, with the specific contention in his affidavit that if the reports of the Advocate Commissioner and the Tahsildar were admitted as evidence without examining the Commissioner as witness, it would cause prejudice to him. But, on the contrary, despite such specific contention put forth by him in the affidavit, he has prayed for a relief in the petition not to

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

take on record the reports filed by the Advocate Commissioner and Tahsildar and therefore learned senior counsel for the revision petitioners has contended that the application itself is misconceived in the stated circumstances of the case.

17. Per contra, Mr.R.Margabandu, learned counsel appearing for the first respondent has justified the impugned order in his arguments contending that in view of the inability of the commissioner to identify and locate the suit property, the learned Assistant Judge was constrained to appoint another commissioner. In this regard, he has pointed out the observation made by the commissioner in his report in paragraphs 7 and 8 to the effect that he could not locate 83 cents in T.S.No.88 which is the plaint schedule property in O.S.No.8119 of 1979. Further, he has submitted that even though the Commissioner's report in paragraph 14 reveals that he has identified and located plot No.40 in T.S.No.87 which totally measures 1.86-1/2 acres, yet he has not given the actual boundaries with reference to that property on ground. Moreover, he has also contended in his arguments that in spite of the efforts made by the commissioner to locate the suit property in plot No.40 with the assistance of a Government Surveyor, layout plan, revenue records and the documents filed in the suit, the layout plan mentioned by the commissioner has not been marked in the suit as a document.

18. In this context, learned senior counsel for revision petitioners contends that the said layout plan had been marked as Ex.B-17 in O.S.No.8119 of 1979 by the trial court and that in view of the vague description of the property in O.S.No.8119 of 1979 and in view of the fact that the boundaries mentioned in the schedule of property in that plaint did not tally with the physical features on ground, the commissioner was constrained to express his inability to locate the suit property. Further he has drawn the attention of this court to the prayer in O.S.No.8119 of 1979 for declaration of title to the land in T.S.No.88 which does not contain any measurement.

19. Similarly he has also pointed out the description in the schedule of property of the suit land as 83 cents out of 2.58 acres in T.S.No.88 within certain boundaries and contended that the Commissioner, despite his best efforts, was not able to correlate the revenue records and other documents and identify the suit property in T.S.No.88. Hence, the learned senior counsel for the revision petitioners would contend and in my opinion rightly that the commissioner's report per se cannot be received in evidence without examining him during trial of the suit.

20. As referred to above, the first respondent himself would contend in the affidavit filed in support of the application that

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

without examining the Commissioner, Tashildar and Surveyor, the reports filed by them should not be received in evidence and therefore this court is of the view that the contention put forth by the learned counsel Mr.Margabandhu justifying the impugned order passed by the trial court is not acceptable.

21. For the aforesaid reasons, I am of the opinion that the ratio in the decision 1995 (II) C.T.C. 557 (CHOKKALINGAPURAM THEVANGAR VARDHAGA SANGAM v. CHOKKANATHASWAMI TEMPLE) relied on by learned counsel for the first respondent cannot be made applicable to this case for the simple reason that even therein the learned Single Judge observed that appointment of a new commissioner depends on facts and circumstances of that particular case.

22. Considering the above facts and circumstances of the case in the light of the ratio laid down in the decision 1917 M.L.J. (Vol.60) 450, the impugned order is certainly unsustainable in law for the simple reason that before ever appointing a new commissioner, as per Order 26 Rule 10(2) & (3) C.P.C., the report of the earlier commissioner has not been rejected for any of the reasons adumbrated therein.

23. Furthermore, in the course of the impugned order, the learned Assistant Judge would agree with the contentions put forth by the first respondent herein that without examining the Commissioner, his report cannot be received in evidence. But at the same time, in the penultimate portion of the same the learned Assistant Judge jumped to the conclusion that the commissioner has to inspect the suit property again to identify and locate the same and that therefore a new commissioner has to be appointed for the said purpose. As has been rightly pointed by the learned senior counsel, Mr.T.R.Mani, the learned Assistant Judge, City Civil Court, Madras while passing the impugned order, did not apply the mind so as to verify whether the report of the commissioner already filed into the court has been accepted or rejected after hearing both sides on the basis of the objections filed by them and therefore this court is of the firm view that at any rate, the impugned order cannot be sustained under law.

24. Further, learned senior counsel, Mr.T.R.Mani appearing for the revision petitioners points out that the plaintiffs in O.S.No.8119 of 1979 are not parties to the impugned proceedings and that they have not filed objection to the report of the commissioner already filed. Further, as has been rightly pointed out by learned senior counsel, the first respondent herein, who is the second defendant in O.S.No.8909 of 1979, is not a party to the suit in O.S.No.8119 of 1979 and therefore the question whether the commissioner was able to identify and locate the suit property in

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

that suit is not the concern of the first respondent herein. On a careful perusal of the records of the case, I am in complete agreement with the contention of the learned senior counsel in this respect and hold that the first respondent has no locus standi to raise any contention with reference to the report of the commissioner in so far as it relates to O.S.No.8119 of 1979.

25. Similarly, he has relied on the orders passed by this court in C.R.P.No.3502 of 2000 dated 5.12.2000 and C.R.P.No.904 of 2001 dated 3.4.2001 and another order in C.M.P.No.15413 of 2001 in S.A.No.1661 of 1989 dated 21.1.2002 in support of his further contention that the first respondent without having bona fide claim initiated all the said proceedings before this Court in order to protract the proceedings and therefore this court rejected his application with the observation that there is absolutely no case made out by him in any of the said proceedings. In view of the above circumstances, learned senior counsel for the revision petitioners has argued that the impugned order is liable to be set aside.

26. It is relevant to note that the first respondent as petitioner in C.R.P.No.904 of 2001 referred supra would object to the removal of the bushes by the Commissioner so as to identify and locate the suit property and he would go to the extent of saying that for that reason, he did not have full confidence on the Advocate Commissioner. The learned Judge of this Court while disposing of the said proceedings observed that there is justification for the Advocate Commissioner to seek permission to remove the bushes to enable him to identify the suit property and accordingly, the Civil Revision Petition filed by the first respondent herein was dismissed. The above mentioned proceedings would indicate that the first respondent has protracted both the suits in one way or the other. Therefore this Court is of the firm view that such an attitude on the part of the first respondent has to be condemned in strong terms.

27. For the aforesaid reasons, the order passed by the court below in I.A.No.7531 of 2004 in O.S.No.8909 of 1979 dated 1.7.2004 is set aside and the revision petition is allowed with the following directions. Firstly, the trial court should hear both sides on the basis of the objections filed by them with reference to the report of the commissioner filed already and to decide the question whether the report of the commissioner has to be accepted or not and also to find out whether the warrant of commission has to be reissued to the same commissioner so as to clarify certain factual aspects involved in the suit by receiving further report with reference to the identity and location of the suit property, etc. If the court comes

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

to conclusion that the objections are sustainable, a finding shall be rendered regarding the earlier report filed by the Commissioner. Thereafter, warrant may be reissued to the same Commissioner with necessary directions in that regard and after receipt of fresh report and plan the suits should be disposed of by not later than 31st August, 2005. However, there shall be no order as to costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

dpp

To

1. The Registrar, City Civil Court, Madras.

1 cc to Mr.R.Margabandu, Advocate, SR. 24961
2 ccs to Mr.A.Venkatesan, Advocate, SR. 24856

C.R.P.(PD) No.1450 of 2004

VC (CO)
kk 23.6.05

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/